Supreme Court, U.S.
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No. 91-2002

IN THE

# Supreme Court of the United States

October Term, 1992

U.E. ENTERPRISES, INC.; FLUSHING STAR, INC.; CHAN'S VIDEO & TRADING, INC.; GONG PICTURES, INC.; DANG'S VIDEO, INC.; PO YUEN,

*Petitioners,*

v.

NEW YORK CHINESE TV PROGRAMS, INC.,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

Try as it might, respondent simply cannot obscure the reality that the Second Circuit below held not merely that the 1946 Friendship, Commerce and Navigation Treaty ("FCN Treaty") between the United States and the government of the Republic of China remains in effect, but also that Taiwan is an independent sovereign nation. The Second Circuit reached this second and separate holding in applying Section 104(b)(1) of the Copyright Act of 1978, which extends copyright protection to a national or domiciliary of a "foreign nation that is a party to a copyright treaty to which the United States is also a party." 17 U.S.C. § 104(b)(1).

Under the Second Circuit's approach, without a threshold finding by the court that Taiwan is a "nation," petitioners' activities would have to be deemed constitutionally protected and any copyright infringement claim would fail. Thus, in order to find for respondent, the Second Circuit was required to "*hold* . . . that the United States' derecognition of Taiwan did not change Taiwan's status as a nation. Because Taiwan is still a nation, the United States may continue to honor its treaties with Taiwan." A11 (emphasis added). That the Second Circuit was announcing its view of the international law status of Taiwan in general is made clear by its citation of two international law authorities on how to determine whether an "entity" is a "nation." *Ibid.*

It is *this* particular holding, and not the court of appeals' ruminations concerning the FCN Treaty, that requires a writ of certiorari in this case. To be sure, a court might be able to reach the conclusion that copyright protection is still available, or that the FCN Treaty is in effect, by means of other legal theories, as the Opposition demonstrates (pp. 4, 11-12, 15-17), as the United States argued below, and as petitioners have already acknowledged, Pet. 3-4 — although these alternative theories present knotty constitutional issues of their own. *See* Pet. 4. But the fact that such alternative theories would be open to the court of appeals for consideration on remand is no reason to deny certiorari; indeed, the opposite is true. Unless certiorari is granted, the Second Circuit's *square holding* that Taiwan is a

"nation" — a holding that respondent hardly defends — will remain on the books as governing precedent in one of the most important circuits for copyright law. The decision below is flatly wrong and offends fundamental separation-of-powers principles by intruding on the Executive's foreign policy authority.

1. Respondent all but concedes that the Second Circuit's central holding — that Taiwan is a "nation" — is indefensible as a matter of U.S. foreign policy. The legal authorities it cites (Opp. 25) do not even purport to come to grips with the policy, uniformly followed by every Chief Executive since President Carter, respecting the view of the Chinese on both sides of the Taiwan Strait that Taiwan is not an independent nation but rather "a part of China." Pet. 10 n.3 (quoting President Bush). Indeed, respondent's repeated arguments that such Executive determinations about the status of foreign entities are entitled to the highest judicial deference (see Opp. 14-15, 20-21) *proves petitioners' point*: although the President has insisted that the FCN Treaty is enforceable, he has never adopted the Second Circuit's theory that Taiwan is a "nation."

2. Respondent concedes, by its silence, that "[c]ourts must protect the office of the Executive regardless of whether the temporary holder of that office defends the Executive's interest in a particular legal proceeding." Pet. 11 n.5 (citing *Zschernig v. Miller*, 389 U.S. 429, 432 (1968)).[1] It is therefore of no

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[1] *See also New York v. United States*, 112 S. Ct. 2408, 2431 (1992) ("The Constitution's division of power among the three Branches is violated where one Branch invades the territory of another, whether or not the encroached-upon Branch approves the encroachment"); *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2639 (1991) ("we are not persuaded by the Commissioner's request that this Court defer to the Executive Branch's decision that there has been no legislative encroachment on presidential prerogatives under the Appointments Clause . . . . According to the Commissioner, the structural interests implicated in this litigation are those of the Executive Branch, which can be expected to look out for itself. . . . We are not persuaded by this approach. . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic.").

moment that the Solicitor General has not yet asked this Court to grant the petition for certiorari or summarily to vacate the Second Circuit's decision.

3. Respondent claims that the Second Circuit's view of the status of the FCN Treaty does not conflict with that of any other court. Opp. 11-12. But the issue before this Court is not whether the FCN Treaty is in effect, but whether a court of appeals may countermand established American foreign policy by decreeing that Taiwan is an independent nation.[2] On *that* question, there is absolutely *no* judicial support for what the Second Circuit has done; indeed, the decision below flouts a long line of precedent from this Court. Pet. 11.

4. The bulk of the Opposition focuses on questions that the Second Circuit below did not decide and that accordingly are not raised by the Petition. The court of appeals did not adopt the district court's decision — defended at length by respondent (Opp. 21-24) — that the Taiwan Relations Act ("TRA") should be construed as a *domestic* law extending to Taiwan the provisions of the FCN Treaty regardless of the effects of derecognition. *See* A37 (summarized at Pet. 3-4). Nor did the court of appeals rest its judgment on any finding that the TRA carried out the United States' promise to Taiwan that the FCN Treaty would remain in effect (Opp. 15-17); on this score the Second Circuit noted only (in dictum) that it appears from the legislative history of the TRA that "Congress indisputably intended that the FCN Treaty remain a valid and enforceable treaty." A10. The court of appeals' decision instead rests squarely on a holding that respondent evidently hopes this Court will ignore: that Taiwan is an independent nation.

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[2] Thus, the decision in *Millen Indus. v. Coordination Council*, 855 F.2d 879 (D.C. Cir. 1988), which respondent describes as "reject[ing] the very same argument raised by Petitioners," Opp. 11, does no such thing. The *Millen* court expressly did *not* decide that Taiwan is an independent "nation," and in fact referred to "the unique relationship between Taiwan and the United States." *Id.* at 883.

5. Quoting the submission of Professor Laurence H. Tribe to the district court, respondent claims that petitioners' argument conflicts with their position below. Opp. 18-19. Nothing could be further from the truth. Petitioners have *never* contended that Taiwan is a "nation." Petitioners have suggested *only* that there is no reason to bend fundamental tenets of constitutional law in order to protect commerce between the United States and Taiwan, since — even though Taiwan is not a nation — it would be possible for the U.S. government to enter into binding agreements with the governing authorities on the island which would accord copyright protection to authors who reside on it.

6. Petitioners plainly have standing to assert, as part of their legal defense to a claim of copyright infringement, that, for purposes of section 104(b)(1) of the Copyright Act of 1978, Taiwan is not a "foreign nation that is a party to a copyright treaty to which the United States is also a party." The Petition does not rest on the claim that the FCN Treaty is now invalid, as respondent would have this Court believe. Opp. 26.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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